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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARTINA A. SILAS, Plaintiff and Respondent, v. PETER DION-KINDEM, Defendant and Appellant.	B208655 (Los Angeles County Super. Ct. No. BC383823)

APPEAL from an order of the Superior Court of Los Angeles County. Kenneth R. Freeman, Judge. Affirmed.

Peter R. Dion-Kindem, in pro. per., for Defendant and Appellant.

Martina A. Silas, in pro. per., for Plaintiff and Respondent.

Plaintiff Martina A. Silas (Silas) sued Peter R. Dion-Kindem (Dion-Kindem) and others, alleging claims for malicious prosecution and abuse of process. Silas and Dion-Kindem are the only parties to this appeal and are both attorneys. Silas's complaint against Dion-Kindem is based on an earlier lawsuit brought against Silas by one of her former clients, Ross Gunnell (Gunnell), who sought damages for alleged legal malpractice. Silas obtained summary judgment in that case, which was affirmed on appeal. Subsequently, Silas filed the instant case, alleging claims against law firms and attorneys (including Dion-Kindem) who were involved in Gunnell's malpractice suit against Silas.

Dion-Kindem filed an anti-SLAPP motion to strike the complaint under Code of Civil Procedure section 425.16. The trial court granted the motion as to the abuse of process claim, but denied the motion as to the malicious prosecution claim. The trial court also denied Dion-Kindem's claim for attorney fees. Dion-Kindem appeals the trial court's order denying his motion to strike the malicious prosecution claim and denying his request for attorney fees. We conclude the trial court was correct on both counts. Accordingly, we affirm.

Procedural and Factual Background[1]

This case follows in the wake of two earlier lawsuits. Silas acted as counsel in the first lawsuit (the *Sony* action), was a defendant in the second (the *Gunnell* action), and is plaintiff in this case. Dion-Kindem was an attorney involved in the second lawsuit and is a defendant in this case.

Lawsuit No. 1: The Sony action. Silas represented Gunnell in *Gunnell v. Sony Pictures, Inc., et al.* (the *Sony* action). In the *Sony* action, Gunnell claimed, among other

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[1] The facts are taken from the complaint in this case and the declarations submitted in support and in opposition to the anti-SLAPP motion. In reviewing the trial court's uling on an anti-SLAPP motion, we "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

things, that his former employer, Metrocolor Laboratories, lied to him about, and concealed from him, the dangers of cleaning substances with which he worked. Before rial, Gunnell settled with one of the *Sony* defendants, a chemical manufacturer named Van Waters & Rogers. Gunnell signed the settlement agreement with Van Waters & Rogers and endorsed the settlement check.

After trial of the *Sony* action, the jury awarded Gunnell $6,650,000 in damages. However, the trial court granted Metrocolor's motion for judgment notwithstanding the verdict, thus vacating the large damages award. On Gunnell's behalf, Silas appealed the order granting judgment notwithstanding the verdict. In a published opinion, on an issue of first impression, Division Three of this Court affirmed the defense judgment. The Supreme Court denied review.

Lawsuit No. 2: The Gunnell action. Following the reversal of his multi-million dollar verdict, a frustrated Gunnell sued Silas for legal malpractice (the *Gunnell* action). Gunnell initiated his lawsuit against Silas in pro. per., filing a simple form complaint. Six months later, Gunnell filed an amended complaint, in which he asserted for the first time that Silas never informed him of the settlement with Van Waters & Rogers and misappropriated the funds from that settlement. Gunnell also asserted facts that conflicted with his testimony in the *Sony* action. Based on those new facts, Gunnell claimed Silas failed to argue a particular legal theory in the *Sony* action.

Soon after he filed his amended complaint, Gunnell sought out Dion-Kindem. Although the parties disagree on the exact nature and extent of Dion-Kindem's relationship with Gunnell, Dion-Kindem concedes that he consulted with Gunnell, served form interrogatories on behalf of Gunnell, communicated multiple times with counsel for Silas, and even participated in settlement discussions on Gunnell's behalf. In a declaration submitted in opposition to the anti-SLAPP motion, F. T. Jelin (Jelin), counsel for Silas, stated that he spoke with Dion-Kindem multiple times about the lack of merit of the *Gunnell* action. Jelin attached as an exhibit a letter he wrote to Dion-Kindem explaining that lack of merit in detail. Jelin also stated that Dion-Kindem threatened state

bar action and proposed a questionable settlement of the *Gunnell* action. Dion-Kindem disputes that he made threats or improper settlement demands. Dion-Kindem never became counsel of record in the *Gunnell* action, nor did he file any documents with the court in that case. Gunnell states he never retained Dion-Kindem as his attorney in the *Gunnell* action.

Eventually, Gunnell retained the law firm of Scott, Arden & Salter to represent him in the *Gunnell* action. Silas filed a motion for summary judgment, which the trial court granted and which the Court of Appeal affirmed.

The current lawsuit. Silas thereafter sued Dion-Kindem, the law firm of Scott, Arden & Salter, and others, based on their alleged involvement in the *Gunnell* action. Silas alleged abuse of process and malicious prosecution.

In response to the complaint, Dion-Kindem filed a special motion to strike the entire complaint under Code of Civil Procedure section 425.16 (the anti-SLAPP law). At the hearing on the motion, the trial court presented its oral statement of decision, which the court later adopted as its final decision. The trial court granted the motion as to the abuse of process cause of action, but denied the motion as to the malicious prosecution cause of action. The trial court also denied Dion-Kindem's request for attorney fees and overruled the parties' evidentiary objections. Dion-Kindem has appealed the trial court's order denying the anti-SLAPP motion as to the malicious prosecution claim and denying his request for attorney fees. Silas did not appeal the order granting the motion as to the abuse of process claim.

Discussion

Standard of Review. "Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).) "We consider the 'pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' ([Code Civ. Proc.,] § 425.16, subd. (b)(2).) However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff

[citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.'" (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn. 3, quoting *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.)

Anti-SLAPP motions under Section 425.16. Under Code of Civil Procedure section 425.16, a party may move to dismiss "certain unmeritorious claims that are brought to thwart constitutionally protected speech or petitioning activity." (*Robinzine v. Vicory* (2006) 143 Cal.App.4th 1416, 1420-1421.) Section 425.16 provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16, subd. (b)(1).)

In evaluating an anti-SLAPP motion, we conduct a two-step analysis. First, we must decide whether the defendant "has made a threshold showing that the challenged cause of action arises from protected activity." (*Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 488.) If the defendant has made this threshold showing, we then decide whether the plaintiff "has demonstrated a probability of prevailing on the claim." (*Ibid.*) To satisfy this burden, the plaintiff "'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" (*Soukup*, *supra*, 39 Cal.4th at p. 291.) The trial court must deny an anti-SLAPP motion if "'"the plaintiff presents evidence establishing a prima facie case which, if believed by the trier of fact, will result in a judgment for the plaintiff. [Citation.]"'" (*Robinzine v. Vicory*, *supra*, 143 Cal.App.4th at p. 1421.) At this stage of the proceedings, the plaintiff "need only establish that his or her claim has 'minimal merit.'" (*Soukup, supra*, 39 Cal.4th at p. 291.)

Step 1: The malicious prosecution claim arises from a protected activity. We agree with the trial court that the malicious prosecution claim arises from protected activity. The anti-SLAPP protection for petitioning activities applies to the filing of

lawsuits, as well as to conduct that relates to such litigation, including statements made in connection with or in preparation of litigation. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) Courts "have adopted a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16." (*Ibid.*) At paragraph 77 of the complaint, Silas alleges that the defendants, including Dion-Kindem, "acted without probable cause in initiating, prosecuting and continuing to prosecute the action without probable cause, and continuing to prosecute it after discovering that they lacked probable cause." Such petitioning activities fall within the scope of the anti-SLAPP statute.

Silas argues the claim is not protected under Section 425.16 because Dion-Kindem acted illegally. Because we conclude below that Silas has demonstrated a probability of prevailing on the malicious prosecution claim, we do not reach this issue.

Step 2: Silas demonstrated a probability of prevailing on the malicious prosecution claim. Having concluded that the malicious prosecution claim is subject to the anti-SLAPP statute, we next consider whether Silas has demonstrated a probability of prevailing on that claim. We hold that she has.

To prevail on her malicious prosecution claim, Silas must show that the *Gunnell* action (1) was "prosecuted" by Dion-Kindem, (2) was pursued to a legal termination favorable to Silas, (3) was brought without probable cause, and (4) was "prosecuted" with malice. (*Soukup, supra*, 39 Cal.4th at p. 292; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) The complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to survive step two of our analysis.

First, Silas alleged and presented a prima facie showing that Dion-Kindem "prosecuted" the *Gunnell* action. "'A person who had no part in the commencement of the action, but who participated in it at a later time, may be held liable for malicious prosecution.'" (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1398.) Dion-Kindem contends that he had limited involvement in the *Gunnell* action and implies that his involvement was primarily for purposes of determining whether he would represent Gunnell in that action. However, although Dion-Kindem

asserts he was never retained as counsel in the *Gunnell* action, he took steps that exceed an attorney's initial analysis of a case. For example, Dion-Kindem concedes that he served interrogatories and engaged in settlement discussions on Gunnell's behalf.

We agree with Dion-Kindem that "prosecuting" a case may include preparing and filing a pleading in the matter. But, certainly, "prosecuting" includes more than that. Prosecuting a case involves all the steps leading to a favorable resolution of the matter, whether through trial and perhaps an appeal, or through arbitration or some other alternative dispute resolution. To prosecute a case, it is not necessary to make an official appearance in the action or to file a document with the court. An attorney may—and, more often than not, does—prosecute a case outside the courtroom. For example, as Dion-Kindem did here, an attorney may make discovery requests and participate in settlement discussions with opposing counsel, all of which serve to move the case forward.

Our understanding of the term "prosecute" is not new. In 1926, our Supreme Court explained that "[t]he term 'prosecution' is sufficiently comprehensive to include every step in an action from its commencement to its final determination." (*Ray Wong v. Earle C. Anthony, Inc.* (1926) 199 Cal. 15, 18.) And, in *Lujan v. Gordon* (1977) 70 Cal.App.3d 260, another division of this court held that attorneys who neither initiated a lawsuit nor filed a substitution of counsel in the case may nonetheless be sued for malicious prosecution. The court concluded that "[t]here does not appear to be any good reason not to impose liability upon a person who inflicts harm by aiding or abetting a malicious prosecution which someone else has instituted." (*Id.* at p. 264.)

Because Dion-Kindem took steps to move the *Gunnell* action forward, we conclude Silas has made a prima facie showing that Dion-Kindem prosecuted the case for purposes of the malicious prosecution claim.

Second, Silas alleged—and there is no dispute—that the *Gunnell* action terminated in Silas's favor.

Third, Silas alleged and presented a prima facie showing that Dion-Kindem prosecuted the *Gunnell* action without probable cause. "The question of probable cause

is 'whether as an objective matter, the prior action was legally tenable or not.' [Citation.] 'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.] 'In a situation of complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.'" (*Soukup*, *supra*, 39 Cal.4th at p. 292.)

Silas presented facts—through declarations and exhibits—that tend to demonstrate a lack of probable cause. For example, counsel for Silas corresponded both by phone and by letter with Dion-Kindem about the lack of merit to Gunnell's lawsuit. In response, Dion-Kindem states simply that "Silas presented no evidence establishing that Dion-Kindem was aware of indisputable facts establishing the lack of probable cause of Gunnell's claims at the time of his limited involvement." This is an incorrect legal standard and is insufficient to overcome Silas's prima facie showing of lack of probable cause. At this stage of the proceedings, Silas need not present indisputable facts. And, in any event, Dion-Kindem does not explain what facts he might have had that did give him probable cause to prosecute the case. Because we do not know what facts Dion-Kindem relied on in prosecuting the *Gunnell* action, we cannot hold that he has overcome Silas's prima facie showing.

In *Soukup*, our Supreme Court held the defendants failed to overcome the plaintiff's prima facie showing of lack of probable cause. Similar to Dion-Kindem here, the *Soukup* defendants responded to the plaintiff's prima facie showing by stating that they did have probable cause to bring their claims against the plaintiff. Those defendants also pointed to certain pieces of evidence in the record as well as rulings in other matter. Nonetheless, the Court held the defendants failed to overcome the plaintiff's prima facie showing. "As against this evidence tending to demonstrate lack of probable cause, defendants generally assert that probable cause existed to support their claims against Soukup without making a specific evidentiary showing as to each claim." (*Soukup*, *supra*, 39 Cal.4th at p. 294.) Thus, because Dion-Kindem does even less here to show probable cause, we conclude he has not met his burden.

Fourth, Silas alleged and presented a prima facie showing that Dion-Kindem prosecuted the *Gunnell* action with malice. "The malice element of the malicious prosecution tort goes to the defendant's subjective intent in initiating the prior action." (*Sycamore Ridge Apartments LLC v. Naumann*, *supra*, 157 Cal.App.4th at p. 1407.) "Malice 'may range anywhere from open hostility to indifference.'" (*Soukup*, *supra*, 39 Cal.4th at p. 292.) "Typically—since it is rare that there will be a 'smoking gun' admission of improper motive—malice is established 'by circumstantial evidence and inferences drawn from the evidence.'" (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 675, citation omitted.) "[M]alice can also be inferred from the evidence that defendants lacked probable cause to initiate and maintain the underlying action against [plaintiff]." (*Soukup*, *supra*, 39 Cal.4th at p. 296.)

Silas's prima facie showing of malice includes not only the evidence supporting Dion-Kindem's lack of probable cause, but also what Silas claims were threats and improper settlement discussions initiated by Dion-Kindem. The parties disagree over the intent or motive behind some of Dion-Kindem's behavior with respect to the *Gunnell* action. But, at this stage of the proceedings, we do not weigh the evidence, and Silas "need only establish that . . . her claim has 'minimal merit'." (*Soukup*, *supra*, 39 Cal.4th at pp. 291, 269, fn. 3.) For purposes of the anti-SLAPP motion, we conclude Silas has made a prima facie showing of malice sufficient for the limited purpose of defeating Dion-Kindem's motion to strike.

For the first time, Dion-Kindem argues in his Reply Brief that we cannot consider the settlement discussions to show malice because such discussions are protected by the litigation privilege. Although Dion-Kindem argued the applicability of the litigation privilege before the trial court, he did so only in the context of Silas's abuse of process claim. And the trial court addressed the litigation privilege in the context of the abuse of process claim. Thus, while the litigation privilege was raised below, it was not raised as a defense to Silas's malicious prosecution claim, and therefore we do not consider this argument for the first time on appeal. (*Williams v. City of Belvedere* (1999) 72

Cal.App.4th 84, 92, fn. 2 [issue raised for first time in reply brief on appeal was "doubly waived"].)

In any event, the mere fact that Dion-Kindem participated in settlement discussions—regardless of what was said in such discussions—raises suspicion that he may have acted with an improper motive. Counsel for Silas sent Dion-Kindem letters explaining in detail the lack of merit of the *Gunnell* action. And, as noted above, Dion-Kindem does not explain what set of facts he was operating on or what research he did before initiating settlement discussions. Based on this record, a trier of fact could find "a degree of indifference from which one could also infer malice." (*Sycamore Ridge Apartments, LLC v. Naumann*, *supra*, 157 Cal.App.4th at p. 1409.)

Relying heavily on *Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478 and *Swat-Fame, Inc. v. Goldstein* (2002) 101 Cal.App.4th 613, disapproved on other grounds by *Zamos v. Stroud*, *supra*, 32 Cal.4th 958, Dion-Kindem argues that malice may not be inferred from a lack of probable cause. However, neither case addresses malice for purposes of making a prima facie showing in response to an anti-SLAPP motion. As the trial court correctly pointed out, "there's a difference between a prima facie showing and proving something." And, in any event, although the trial court appears to have found a prima facie showing of malice based solely on lack of probable cause, our conclusion is not based solely on the evidence tending to show a lack of probable cause. As explained above, Silas has proffered additional evidence that supports the prima facie showing of malice.

Dion-Kindem is not entitled to attorney fees. Under Section 425.16, "a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs." (Code Civ. Proc., § 425.16, subd. (c).) Dion-Kindem argues he is entitled to his attorney fees for filing the anti-SLAPP motion and for prosecuting this appeal. We disagree.

Our Supreme Court's recent decision in *Musaelian v. Adams* (2009) 45 Cal.4th 512 is instructive. There, the Court addressed whether an attorney who represents himself in responding to an improperly filed lawsuit or other improper filing under Code

of Civil Procedure section 128.7 is entitled to attorney fees under that statute. The Court held that Section 128.7 does not permit attorney fees to self-represented attorneys. (*Id.* at p. 520.) The Court distinguished cases where courts have awarded attorney fees when an attorney-client relationship existed. In those cases, "the attorney performed services on behalf of the client, and the attorney's right to fees grew out of the attorney-client relationship." (*Ibid*.) In *Musaelian*, as here, the attorney prosecuting the case represented his own personal interests. In such cases, the Supreme Court held the attorney is not entitled to attorney fees. (*Ibid*.) Even before *Musaelian*, courts refused to award attorney fees under Section 425.16, subdivision (c), to an attorney or law firm representing its own interests on an anti-SLAPP motion to strike. (See, e.g., *Taheri Law Group v. Evans*, *supra*, 160 Cal.App.4th at p. 494; *Witte v. Kaufman* (2006) 141 Cal.App.4th 1201, 1207-1211.)

We are not persuaded by Dion-Kindem's argument that he has "retained" the legal corporation Peter R. Dion-Kindem, P.C. to represent him and that an attorney-client relationship exists between Dion-Kindem and Peter R. Dion-Kindem, P.C. For all intents and purposes, Dion-Kindem ***is*** Peter R. Dion-Kindem, P.C. Dion-Kindem is both the client and the attorney. He admits as much in his declarations supporting his motion to strike. In his declarations, Dion-Kindem requests fees to cover all the work ***he*** has done and expects to do with respect to the anti-SLAPP motion. He does not state that any other attorney in the firm or elsewhere has worked on the matter, nor does he state that he has paid or will pay any fees to Peter R. Dion-Kindem, P.C. It is clear that Dion-Kindem is representing his own personal interests in this matter. Consequently, he may not recover attorney fees.

Evidentiary Objections. Dion-Kindem objected to portions of (1) the Declaration of Frederick T. Jelin and (2) the Declaration of Martina A. Silas. Dion-Kindem argues the trial court erred in overruling his evidentiary objections. Although, as Silas points out, Dion-Kindem barely raises the issue of his evidentiary objections in his appellate briefs, we nonetheless consider the issue and conclude the trial court did not abuse its discretion in overruling Dion-Kindem's evidentiary objections. (*Zhou v. Unisource*

Worldwide, Inc. (2007) 157 Cal.App.4th 1471, 1476 ["A trial court's ruling on the admissibility of evidence is generally reviewed for abuse of discretion"].) In any event, even if we were to reverse the trial court's rulings on the evidentiary objections, that would not affect our decision here.

Disposition

The trial court order dated April 23, 2008 is affirmed. Silas is to recover her costs on appeal.

NOT TO BE PUBLISHED.

BAUER, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

*Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.